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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 483

SHERMAN H. EARY, SR., ET AL,

Petitioner,

vs.

WEST VIRGINIA TURNPIKE COMMISSION,
as an agency of, for and in the
name of the STATE OF WEST VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ~~UNITED STATES~~ SUPREME COURT OF APPEALS, ~~WASHINGTON, D. C.~~ West Virginia

SHERMAN H. EARY, SR.
535 Burlew Dr.
Charleston, W. Va.,
Petitioner

JONES PRINTING CO., CHARLESTON, W. VA.

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WEST VIRGINIA TURNPIKE COMMISSION,
as an agency of, for and in the
name of the STATE OF WEST VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEALS, WASHINGTON, D. C.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioner respectfully shows:

THE OPINIONS BELOW.

Upon issues, facts, rulings and the jury verdict the Circuit Court Judge, Honorable Frank L. Taylor of Kanawha County, West Virginia entered order of judgment October 30, 1954, Tr. 69 to 72 and Appx. page vi to ix, and a further order vesting title in respondent from petitioner, paying into court the sum of

$7,270.00 plus $521.00 interest for 4.431 acres of private real property situate in Town of Marmet, Loudon District, Kanawha County, West Virginia. Tr. 84 to 86 and Appx. page xvii, motion to set aside Tr. 82, 83, 74 and Appx. page x. On April 13, 1955 a petition and note of argument was filed with the Supreme Court of West Virginia at Charleston for a writ of error and supersedeas, which was refused, Tr. 223 to 236, Appx. page iv. May 24, 1955 second application was made refused by a majority of the court. Judge Riley would grant Tr. 237, Appx. page vi. June 18, 1955, third application with an amended and supplemental petition was refused by majority of the court as plainly right. Judge Riley would grant. Tr. 238 to 243, Appx. page v.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

I. Amendment to the Constitution of United States Articles V and XIV.

II. The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254, providing for review of decisions of the United States Courts of Appeal by this Court.

QUESTIONS PRESENTED.

The questions raised by this petition are:

Can a trial court refuse the defendant the right to defend his property holdings in the United States, being a citizen, at law (personify)? Tr. 221, Appx. page iii.

Can un-necessary private land be condemned for public use on mere allegations in a petition Demurrer? Tr. 2 and 17, Appx. page xv.

Can a trial judge vacate the bench on the return day of notice to appoint commissioners to go upon condemned property and assess just compensation, a special judge chosen by the bar who refuses to bring them before the bar of the court to qualify as such and before the parties concerned, the order of appointing signed by him instead of the special judge who actually did the appointing. Tr. 19½ to 22½?

Can adjoining properties, bought by condemnor be excluded from the consideration of jury as to the value? Tr. 109 and Tr. 214, 215 AB and Proffer page 108-109 (marked). App XX

Is the burden of proof on a landowner to prove the value when he is defendant in a condemnation case? Tr. 191 Instruction 2.

Verdict of the jury predicated and found on hypothetical evidence ignoring real and basical evidence Tr. 88 to 213.

Whether the Circuit Court trial judge erred in refusing to set aside verdict of the jury and entering judgment plainly contrary to applicable West Virginia law governing the admission and rejection of evidence. The Supreme Court of West Virginia refusing a majority to grant a writ of error on third application as plainly right.

STATEMENT OF THE CASE.

Respondent filed an action Eminent Domain in the Circuit Court of Kanawha County, West Virginia, against petitioner and possible lien holders which should have been omitted, condemning land for public use as a turnpike (two lane). The principal defense

raised by the petitioner was that he was being ignored as a land owner, denied to defend his holdings in a court of law; the commission through its agents was deliberately and wilfully confiscating more land than was necessary to carry out their project, discriminate, arbitrary, unfair, leaving .229 acres of 4.73 parcel, taking 1.185 acres from a 3½ acre adjoining tract or parcel Morris property, which was the general right of way along the turnpike except terminals, refusing to pay comparable compensation or just compensation, using persons as appraisal commissioner, expert real estate men who had been on the government list for such services a period of 20 years. The court being absent permitting special judge to act, signing orders as though he acted.

EVIDENCE ADMITTED:

Every witness introduced by the respondent admitted he had never bought or sold any real property in the area of petitioner. On the contrary petitioner's witnesses had.

EVIDENCE EXCLUDED.

Although the proffered proof prices paid for adjoining properties because of a residue to condemnee the trial court aggravated his erroneous ruling by forcing petitioner to be content with value of acreage, good for gardening only, not for commercial purposes.

ARGUMENT

Our position in this Court is that a citizen has a right by the usual modes to acquire and hold property, to protect and defend the same in law, to appear personify in the event being made a defendant, regardless of his status to practicing law as attorney. However in this, petitioner is a licensed, member in good standing of the State of Tennessee, also West Virginia up and until in 1934 an order of disbarment. Cooley's Constitutional Limitations 8 edition Carrington, Vol. 1 703. Three reports appear in this action from the appraisal Commissioners Tr. 32, 35, 64, last one for $8,500.00 for 4,431 acres demanded. These commissioners were refused by the trial court to appear at bar to be questioned as to their competency Tr. 22. Court (special Judge Charles Ritchie) presiding at this time under the statute selected 13 purported disinterested freeholders, five to go upon the land, to make and report just compensation. Adjoining properties sold on the average $17,000.00 acre.

CONCLUSION

In the light of the foregoing, respectfully submit that it is clear that the trial court erred in over-ruling demurrer, Tr. 17 and 18, Appx. page , motion to set aside jury verdict, the majority of the Supreme Court of West Virginia refusing to grant writ of error and supersedeas, substantial rights as to urgently require reversal and the granting of a new trial.

Standing as it does, in plain contravention not only of the marked tendency liberalizing introduction of evidence, but indeed, contrary to the whole body of law

governing admission of evidence in eminent domain cases, is such a flagrant violation of long settled law and such patent departure from accepted procedure as to warrant further review by this Honorable Court.

Petitioner is of sincere conviction that the decision stands in conflict not only with the United State Constitution, Articles 5 and 14, but also in conflict with applicable West Virginia law. Indeed, because of the concurrence of the several departures from accepted procedure, petitioner believes that this case is one which make a particularly urgent appeal for review by this Court, as suggested by its Rule 19.

For the reasons hereinabove set forth, respectfully submit that this Court should grant to the petitioner its writ of certiorari, and that upon a full hearing of this cause upon the return of said writ, the judgment of the trial court and the refusal of the Supreme Court of West Virginia, to grant writ of error and supersedeas, should be reversed, with directions to remand the cause to the Circuit Court of Kanawha County, West Virginia, for a new trial.

Respectfully submitted,

SHERMAN H. EARY, SR.,
Petitioner

RULE 61 OF FEDERAL RULES OF CIVIL PROCEDURE.

Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruuling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 43(a) OF FEDERAL RULES OF CIVIL PROCEDURE.

Rule 43. Evidence.

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

Sec. 5377 (6) How Commissioners Appointed

The appointment shall be made as follows: Thirteen disinterested freeholders shall be nominated by the court, or the judge thereof in vacation, of whom the applicant may strike off four from the list, and the defendant or defendants may also strike off four, and after eight names are stricken from the list the remaining five shall be the commissioners. But where there is no appearance for the defense or the right to strike off any one or more names is waived on the part of either the applicant or defendant, or from any cause the full number shall not be stricken off by the parties, the name or additional names as the case may be stricken from the list in order to reduce the number to five, shall be ascertained by lot under direction of the court or the judge thereof in vacation. The court, or judge thereof in vacation, may for good cause remove any commissioner and fill any vacancy.

Amendments to the Constitution of the United States

Art. V.... nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
Art. XIV.

... All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA TURNPIKE COMMISSION,
as an agency of, for and in the
name of the State of West Virginia.
Petitioner,

VS: IN EMINENT DOMAIN.

SHERMAN H. EARY et als
Defendants.

DEFENDANTS' BILL OF EXCEPTIONS NO. 2

BE IT REMEMBERED, that upon the trial and preliminaries in the above case before the Circuit Court of Kanawha County, West Virginia, the defendant, Sherman H. Eary, moved the court to permit him to act as his own attorney and represent himself and try his own case, which motion the court denied and the court refused to permit the said Sherman H. Eary to represent himself and refused to permit him to appear in behalf of himself and as his own attorney and to the action of the court the said Sherman H. Eary objected and excepted at the time.

And thereupon the defendant, Sherman H. Eary, tenders this as his bill of Exceptions No. 2 and marked "Defendant's bill of Exceptions No. 2", and prays that same may be signed, sealed enrolled and saved to him and made a part of the record herein which is accordingly done this 21st day of December, 1954 and within

sixty days from the adjournment of the term of court at which the judgment was rendered herein.

Given under my hand this the 21st day of December, 1954.

Frank L. Taylor Tr. 221
JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA.

STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of May, 1955, the following order was made and entered, to-wit:

West Virginia Turnpike Commission, as an agency of, for and in the name of the State of West Virginia

vs.

Sherman H. Eary, Sr., et al.

On a former day, to-wit, April 13, 1955, came the petitioner, Sherman H. Eary, Sr., in person, and presented to the Court his petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Kanawha County rendered in this case on the 30th day of October, 1954, with the record thereof, which being seen and inspected by the Court the writ of error and supersedeas prayed for is refused.

The petition and note of argument referred to in the foregoing order are in the words and figures following, to-wit: Tr. 223 to 236.

STATE OF WEST VIRGINIA:

At a Special Term of the Supreme Court of Appeals Continued and held at Charleston, Kanawha County, on the 28th day of July, 1955, the following order was made and entered, to-wit:

West Virginia Turnpike Commission, as an agency of, for and in the name of the State of West Virginia

vs.

Sherman H. Eary, Sr., et al.

On a former day, to-wit, June 18, 1955, came again the petitioner, Sherman H. Eary, Sr., in person, and presented to the Court his petition and amended and supplemental petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Kanawha County rendered in this case on the 30th day of October, 1954, with the record therein accompanying the petition, and note of argument and amended and supplemental note of argument in support thereof, which being seen and inspected by the Court the writ of error and supersedeas prayed for is refused on this third application by a majority of the Court on the grounds that the judgment of the trial court is plainly right. Judge Riley would grant.

The amended and supplemental petition referred to in the foregoing order are in the words and figures following, to-wit: Tr. 238 to 243.

STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on

the 6th day of June, 1955, the following order was made and entered, to-wit:

West Virginia Turnpike Commission, as an agency of, for and in the name of the State of West Virginia

vs.

Sherman H. Eary, Sr., et al.

On a former day, to-wit, May 24, 1955, came again the petitioner, Sherman H. Eary, Sr., in person, and presented to the Court his petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Kanawha County rendered in this case on the 30th day of October, 1954, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the writ of error and supersedeas prayed for is refused on this second application by a majority of the Court. Judge Riley would grant. Tr. 237.

WEST VIRGINIA TURNPIKE COMMISSION,
as an agency of, for and in the
name of the State of West Virginia,

Vs. In Eminent Domain
Parcel 1575

SHERMAN H. EARY, SR., et al.

On this 15th day of October, 1954, came the West Virginia Turnpike Commission, as an agency of, for and in the name of the State of West Virginia, by Woodroe & Kizer, its attorneys, and came also the defendant land owner, Sherman H. Eary, Sr., by C. E. Copen, his attorney, and announced that they were ready for trial.

Thereupon came a jury of freeholders, to-wit, Frank Leighty and eleven other good and lawful men, duly

selected, empanelled and sworn according to law to well and truly try the issue joined herein and to ascertain what would be a just compensation for the land sought to be taken in this proceeding, as well as the damages to the residue of the real estate belonging to the defendant beyond all benefits which will accrue to such residue from the work to be constructed thereon as set out in the petition filed herein. And the jury having viewed the premises and heard all of the evidence adduced on behalf of the petitioner and the defendants, the instructions of the court, and the argument of counsel thereon, retired to their room to consider of their verdict, and after a time returned into court and upon their oaths did say:

> "We, the jury, are of the opinion and so find that the sum of Seven Thousand Two Hundred Seventy Dollars ($7,270.00) will be just compensation for the real estate taken by the West Virginia Turnpike Commission, as an agency of, for and in the name of the State of West Virginia, which real estate is fully set out and described in the applicant's petition to which reference is hereby made for a more complete description of the real estate taken in this proceeding, as well as for damages to the residue of the real estate.
>
> /s/ Frank Leighty
> Foreman"

And, thereupon the jury was discharged from further consideration in this proceeding.

And, thereupon, the defendant, Sherman H. Eary, Sr., in person and by counsel, moved the court to set aside the verdict of the jury and to award him a new trial for the reasons set forth in a certain motion in

writing tendered to the court, which motion in writing, together with certain exhibits attached thereto, is ordered filed as a part of the record in this cause. Said motion being argued by counsel and considered by the court is overruled, and to which action of the court in overruling said motion the defendant, Sherman H. Eary, Sr., objected and excepted.

It is, therefore, considered by the court that the defendants in this proceeding do recover of and from the West Virginia Turnpike Commission, as an agency of, for and in the name of the State of West Virginia, the sum of Seven Thousand Two Hundred Seventy Dollars ($7,270.00), with interest thereon at the rate of six per cent (6%) per annum from and after the 10th day of September, 1953, until paid, and upon such payment title to the property mentioned and described in the petition herein shall be absolutely vested in the West Virginia Turnpike Commission, as an agency of, for and in the name of the State of West Virginia, free and clear of all liens and encumbrances, except as hereinafter set forth, including but not limiting the generality of the foregoing, the freedom from any and all easements or rights of way over, across, along, through, upon or under, or rights of access to or egress from said land; the same being the absolute fee simple title in and to the following described real estate, to-wit:

All that certain lot or parcel of land, together with all appurtenaces thereunto belonging, situate in the Town of Marmet, Loudon District, Kanawha County, West Virginia, on the westerly side of and adjoining the westerly right of way line of the Chesapeake & Ohio Railway Company, bounded and described as follows:

Beginning at a point in the westerly right of way line of the Chesapeake & Ohio Railway Company, corner to Sherman Eary and James Cochran; thence with said right of way line of said railway, in a southerly direction, 158 feet, more or less, to a point; thence S. 60° 40′ W. 61.5 feet; thence S. 14° 53′ 49″ E. 156.5 feet to a point in the dividing line between said Eary and Ben Morris, said point being S. 60° 40′ W. 68 feet from the westerly right of way line of the Chesapeake & Ohio Railway Company; thence with the dividing line between said Eary and Morris, S. 69° 40′ W., passing Turnpike Baseline Station 2215+12 at 100 feet, in all 513.9 feet to a point in the rear line of Sherman H. Eary, Sr.; thence with the rear line of said Eary, N. 37° 12′ 30″ W. 335.5 feet to a point in the line of James Cochran; thence with the dividing line between said Eary and Cochran, N. 62° 25′ E. 690 feet to the place of beginning; containing 4.431 acres, more or less, and being a part of the same real estate heretofore conveyed to Sherman H. Eary, Sr., by Annie Eary and others by deed dated February 21, 1933, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 385, page 294; to which said deed reference is here made for a further description of said real estate; subject, however, to an easement and right of way for telephone and telegraph lines granted by Sherman H. Eary to the Chesapeake & Potomac Telephone Company, a corporation, by deed dated December 9, 1938, and of record in said Clerk's office in Deed Book 490, page 217.

It appearing to the court that the verdict of the jury in this case is less than the amount of compensation awarded for said land by the commissioners heretofore

appointed in this case, it is ordered that neither party to this proceeding recover costs but that each of the parties pay their own costs.

To all of which actions of the court in entering judgment on said verdict, Sherman H. Eary, Sr., one of the defendants, objected and excepted.

Thereupon, the defendant Sherman H. Eary, Sr., in person, announced his intention to apply to the Supreme Court of Appeals for an appeal and supersedeas to this decree, and, upon motion, it is adjudged, ordered and decreed that this decree be, and it hereby is, stayed for a period of sixty (60) days within which to make application for such appeal and supersedeas, but upon condition that the said Sherman H. Eary, Sr., or someone for him, shall enter into a bond before the Clerk of this Court with good security, conditioned according to law, in the sum of Five Hundred Dollars ($500.00).

All of which is adjudged, ordered and decreed accordingly.

Motion.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

at Charleston.

WEST VIRGINIA TURNPIKE COMMISSION,
as an agency of, for and in the
name of the State of West Virginia,

Vs. In Eminent Domain
Parcel 1575

SHERMAN H. EARY, SR., et al.

This 16th day of October, 1954, comes Sherman H. Eary, Sr., in person and moves the Court to set aside

and vacate the verdict of jury in this case found October 25 1954, and assigns the following reasons:

1. The verdict returned by the jury is grossly inadequate and unjust, and contrary to the law and evidence, and in violation of section 9 article 3 constitution of the State of West Virginia, also the constitution of the United States of America amendment thereto article 14 section 1 and article 5.

2. The defendant Sherman H. Eary, Sr., was summoned in the court on a 4 day notice as the record will show on its face. In fact and deed the turnpike commission through its employees and agents had seized and took possession of the amount at the time then asked for in their petition filed, and the supplemental petitions. Your Honor was informed of same at the time counsel ask the court for an order to enter. Also at the return date of said summons your Honor, Judge Frank L. Taylor, informed this defendant, Sherman H. Eary, Sr., who had appeared to defend said cause that he, Sherman H. Eary could not appear and defend said cause that it was embarrassment to the court. Adding that the court would continue the case for the purpose that counsel could be had by the defendant Sherman H. Eary, Sr., all which was protested and objected to by Sherman H. Eary and made a part of this record. Sherman H. Eary, Sr., then consulted with different attorneys then members of bar of your Honors Court, after which he was refused help for various and sundry reasons of the past. Finally C. E. Copen of Winfield, Putnam County, West Virginia agreed to represent the defendant Sherman H. Eary, Sr., interests in said premises through the court until just and adequate compensation for the real property taken was recover-

ed. The only appearance made by said attorney was before the jury in Circuit Court of Kanwaha County. All of the evidence from the standpoint of the defendant Sherman H. Eary, Sr., was gone into and agreed to and especially, the parcel of land owned and sold by Ben F. Morris, Jr., for the sum of $22,000.00 joining the defendant Sherman H. Eary, Sr., on the East Side and James Cochran sold for $9,990.00 on the west side joining the defendant Sherman H. Eary, Sr., as well as other real properties sold in the immediate area, or locality, that if said evidence was not permitted to go to the jury, it would be fully made a part of the record for the purpose of presenting the whole matter to the supreme court if so desired by the defendant Sherman H. Eary, Sr. This he has failed to do. He has consented to orders and withheld same from the defendant Sherman H. Eary, Sr., which are and was prejudical in the case. Instead of living up as an attorney to his client, he writes a letter withdrawing from the case dated October 23 1954, same being received by the defendant October 26 1954 at 12 o'clock AM. At 3 o'clock your Honor was notified by registered mail.

All of this goes to the effect of deceit and fraud placed upon the defendant Sherman H. Eary, Sr., causing him not to receive a fair and impartial trial, and being compensated the price he was entitled to under the law, namely, the highest or just price the real property could be used for at the time of so taken. But on the contrary a price was awarded with the consideration of outlying, unused land to the commons.

C. E. Copen attorney failed to show or even to attempt to or get in the record, notwithstanding he had told this defendant that he would and keep the record

in good order, that this property was and had been platted into a subdivision contaning 30 lots, and being buildings placed on same and foundation for others for a commercial purpose. This would have been to the advantage of the defendant.

This defendant Sherman H. Eary, Sr., insisted that the picture taken before and after the turnpike was made be offered. The court no doubt saw the argument between counsel C. E. Copen and defendant Sherman H. Eary, Sr., over same, which finally was offered as evidence.

If the court will recall James Cochran was called to the stand but was never examined, Morris also not called, although defendant Sherman H. Eary requested same.

3. The jury was required to view the real property during a heavy rain fall. Elderly men which was on the jury were physically unable to view properly the premises. Therefore under the circum tances a clear and fair view of the real property involved was not made. The court will recall that a number stood on the steps of the special bus which was used for the conveyance.

4. The defendant has been divested of 4.431 acres of improved commercial land without any evidence that it is necessary for public use and without just compensation.

5. The court should grant a new trial because the special judge, Charles Ritchie over the objection of the defendant Sherman H. Eary, Sr., appointed 13 commissioners without requiring them to appear before the

bar of the court to be examined by the parties to their qualifications as such commissioners. And also, the 13 commissioners being reduced to 5, only 4 viewed the real property and made their report to the court.

Parcel No. 1575

IN CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
WEST VIRGINIA TURNPIKE COMMISSION
as an agency of, for and in the name
of the STATE OF WEST VIRGINIA,

Petitioner,
upon proceeding to
CONDEMN LAND FOR
PUBLIC USE

vs.

SHERMAN H. EARY, SR.,
PEARL EARY,
CHARLESTON NATURAL GAS COMPANY, a corporation,
THE UNKNOWN OFFICERS DIRECTORS, AND STOCKHOLDERS OF CHARLESTON NATURAL GAS COMPANY, a corporation,
JOHN F. ELLISON, TRUSTEE,
HENRY S. FINNEY,
LILLIE F. SMITH,
MYRTLE F. OSBORNE,
WILLIAM E. FINNEY,
JACK FINNEY,
KATHRYN MADDOX WOOLDRIDGE,

JOHN MADDOX,
THE KANAWHA VALLEY BANK, a corporation, an JOE L. SILVERSTEIN, JR. EXECUTORS OF THE ESTATE of Joe L. Silverstein, deceased, trustee,
WILLIAM G. BARTH,
CHARLES F. BARTH
ELEANOR BARTH HEISTAND,
AL. J. CAREY, SHERIFF OF KANAWHA COUNTY, WEST VIRGINIA,

First:

This 3rd day of September 1953, Came the defendant Sherman H. Eary, Sr., by his Attorney and moves the Court to Squash and dismiss the notice and Petition herein filed against him in said Cause on the ground: That said Notice and Petition are insufficient in Law upon their face.

Second:

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said notice and petition contained, to be true, in such matter and form as the same are therein and thereby set forth and alleged, demurs to said notice and petition, and for cause of demur shows that: are insufficient in law upon their face. That said parcel of land sought should not exceed 250 ft, 100 ft N of center line turnpike and 150 S running 328 ft, any amount in excess is unnecessary and secondary to the construction of same.

Wherefore, and for divers other good causes of de-

murrer appearing in the said notice and petition and to all the matters and things therein contained, and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to the said notice and petition, and he prays to be dismissed with his reasonable costs in this behalf sustained.

Solicitors for Defendant.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, To-wit:

Sherman H. Eary, Sr., being duly sworn upon his oath says that he has read the foregoing motion to quash and demur, that he knows the contents thereof, that the facts and allegations therein contained are true, except such as are therein stated to be upon information and belief, and that as to such allegations he believes them to be true.

/s/ Sherman H. Eary, Sr.

Taken, sworn to and subscribed before me in my aforesaid County and State this 3 day of September, 1953
My commission expires March 5, 1963.

/s/ Harvey C. Dunlap
Notary Public

WEST VIRGINIA TURNPIKE COMMISSION,
as an agency of, for and in the
name of the State of West Virginia

Vs. In Eminent Domain
Parcel 1575

SHERMAN H. EARY, SR., et al,

This day came the petitioner, West Virginia Turnpike Commission, as an agency of, for and in the name of the State of West Virginia, by Woodroe & Kizer, its attorneys, and tendered and paid into court the sum of Seven Thousand Two Hundred Seventy Dollars ($7,270.00), and interest thereon from September 10, 1953, to this date, amounting to Five Hundred and Twenty-one Dollars ($521.00) in full payment of the amount as ascertained by the verdict of the jury as just compensation for the land taken in this proceeding; and thereby petitioner paid in full the amount ascertained by the verdict of the jury as just compensation for the land taken by the petitioner, and hereinafter described, as well as the damages to the residue of the real estate belonging to the defendants.

It is therefore considered by the court that the title to the real estate taken by the petitioner, being the real estate described in the petition and the report of commissioners filed herein, be, and the same hereby is, vested in the West Virginia Turnpike Commission, as an agency of, for and in the name of the State of West Virginia, free and clear of all liens and encumbrances, except as hereinafter set forth, including but not limiting the generality of the foregoing, the freedom from any and all easements and rights of way over, across, along, through, upon or under, or rights of access to or egress

from said land; the same being the absolute fee simple title to the following described real estate, to-wit:

All that certain lot or parcel of land, together with all appurtenances thereunto belonging, situate in the Town of Marmet, Loudon District, Kanawha County, West Virginia, on the westerly side of and adjoining the westerly right of way line of the Chesapeake & Ohio Railway Company, bounded and described as follows:

Beginning at a point in the westerly right of way line of the Chesapeake & Ohio Railway Company, corner to Sherman Eary and James Cochran; thence with said right of way line of said railway, in a southerly direction, 158 feet, more or less, to a point; thence S. 60° 40′ W. 61.5 feet; thence S. 14° 53′ 49″ E. 156.5 feet to a point in the dividing line between said Eary and Ben Morris, said point being S. 60° 40′ W. 68 feet from the westerly right of way line of the Chesapeake & Ohio Railway Company; thence with the dividing line between said Eary and Morris, S. 69° 40′ W., passing Turnpike Baseline Station 2215+12 at 100 feet, in all 513.9 feet to a point in the rear line of Sherman H. Eary, Sr.; thence with the rear line of said Eary, N. 37° 12′ 30″ W. 335.5 feet to a point in the line of James Cochran; thence with the dividing line between said Eary and Cochran, N. 62° 25′ E. 690 feet to the place of beginning; containing 4.431 acres, more or less, and being a part of the same real estate heretofore conveyed to Sherman H. Eary, Sr., by Annie Eary and others by deed dated February 21, 1933, and of record in the office of the Clerk of the County Court of Kanawha County, West Virginia, in Deed Book 385, page 294; to which said reference is here made for a further

description of said real estate; subject, however, to an easement and right of way for telephone and telegraph lines granted by Sherman H. Eary to the Chesapeake & Potomac Telephone Company, a corporation, by deed dated December 9, 1938, and of record in said Clerk's Office in Deed Book 490, page 217.

It is further ordered by the Court that the Clerk of this Court do forthwith transmit to the Clerk of the County Court of Kanawha County, West Virginia, a certified copy of this decree to be spread upon the records of said County Court Clerk's Office.

It appearing to the court that by an order entered herein on the 10th day of September, 1953, the petitioner was required to give bond in the penal sum of Ten Thousand Dollars ($10,000.00), to secure the defendants in this proceeding against loss or damage by reason of the failure of the petitioner to accept or pay for the land sought to be taken in this proceeding; and it further appearing to the court that the petitioner has paid to the Clerk of this Court the full compensation for the land taken as determined by the verdict of the jury, together with interest thereon, and the costs of this proceeding for which it is liable, upon motion, it is ordered that petitioner be, and it hereby is, relieved of all liability upon the bond heretofore filed herein and that the funds deposited as security therefor with the Charleston National Bank, a national banking association, be forthwith released to petitioner.

All of which is adjudged, ordered and decreed accordingly.

Objected and excepted.

IN CHAMBERS

Whereupon, the Court, counsel for the parties and the reporter then retired into chambers, out of the presence and hearing of the jury, where the following proceedings were had:

THE COURT: Mr. Copen, I understand you want to make an offer of certain evidence, as to which I indicated I would sustain an objection.

MR. COPEN: Yes, sir. Counsel now proffers and offers to introduce in evidence a certain deed made by James Cochran and Phyllis Cochran, his wife, to The Turnpike Commission for 7/10 of an acre of land immediately adjoining and lying west of the property of Sherman H. Eary, and it is the purpose of the condemnee to show thereby the value of the real estate sold by James Cochran and wife, which deed conveys to The Turnpike Commission the entire tract of real estate owned by said Cochran, and from which there is no residue, and we propose further to show by said deed the consideration paid by the Turnpike Commission for said 7/10 of an acre.

MR. KIZER: We object.

THE COURT: I will sustain the objection. I will not permit the evidence of voluntary sales by property owners to the Turnpike Commission, in view of the fact that under the petition and map already introduced it appears that there is here not a taking of the whole, but a taking of a part of the land, and the question of damage to the residue is one of the questions in this case. (Exception)

MR. COPEN: We also offer and propose to show by the Morris Property, which, according to the evidence, adjoins the Eary property, the consideration paid to Mr. Morris for something in excess of one acre taken by the Turnpike Commission, and for the purpose of determining by comparison the value of the Eary land acquired by the Turnpike.

MR. KIZER: We object to that also.

THE COURT: The objection to that will also be sustained. (Exception)

(The deeds referred to by counsel were thereupon marked for identification as Eary Exhibits "A" and "B," respectively, photostatic copies of said deeds being attached hereto and made a part of this record.)